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John F. Chmiel

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Damages

RECOVERY FOR MENTAL SUFFERING FROM BREACH OF CONTRACT

Introduction

The attempt to recover damages for mental suffering resulting from a breach of contract has generally been met with disfavor by the courts. Denial of damages is based upon several grounds: *e.g.*, remoteness of the injury from the breaching act; lack of an adequate standard or measure of damages; the danger of speculative and easily simulated injuries which would be difficult to disprove; and the inevitable fear of increased litigation. Yet despite the reasons advanced, mental damages are considered to be a proper element in an action sounding in tort, and resort is made to this latter theory by some courts in sustaining a recovery for mental suffering occasioned by breach of contract.

The vast majority of contract actions are essentially commercial transactions. In such cases recovery for mental suffering is denied, even though it is conceded that there is some element of mental anguish connected with the pecuniary loss.¹ Yet where the injury entails more than a pecuniary loss, and the duty violated is closely associated with the feelings and emotions of the injured party, recovery for mental anguish has in some instances been allowed. It is this relationship between the contract and the personal interests of the injured party to which the courts have directed their attention. The problem is one of proximate causation; that is, it must be shown that by the violation of the contract the resultant mental sufferings were a foreseeable or direct result of the breach. Hence the contracts to be examined in this Note necessarily will be those that are essentially personal in nature.

There is little uniformity in the decided cases even where it is conceded that the subject of the contract is personal to one of the parties. Moreover, in those cases where a right to recover is recognized, the rationale of the cases may differ widely. Consequently, concise classification is not possible and any grouping is to some extent arbitrary. The sections into which this Note is divided are not mutually exclusive but rather they represent areas of the subject which have been artificially isolated for convenience of treatment.

¹ See *Pfeffer v. Ernst*, 82 A.2d 763 (D.C. 1951).

Injury to Domestic Interests

In one type of case, the courts are unanimous in awarding damages for mental suffering unless the action has been abrogated by statute. These cases concern breach of marriage contracts² in which the form of the action is contract but tort is the basis for recovery of damages. The recoverable damages are for humiliation, mortification, damaged reputation, and mental suffering.³ The right to damages is enforceable against the estate of the breaching party, for the promise, although personal, merges with the duty to pay damages on the breach.⁴

Another example of activity which has been regarded as being of such a personal nature as to warrant relief for breach of performance is the handling and custody of bodies of members of the plaintiff's family. Recovery for mental suffering was permitted where a mortician failed to keep a body in a vault⁵ and where a body was wrongfully withheld from the members of the deceased's family.⁶ Similarly, when a mortician contracted to conduct a funeral and failed to properly fulfill his obligation, recovery for mental suffering was granted on the ground that the personal nature of the contract was such that mental suffering was a natural and probable result of its breach. It was reasoned that the parties contracted with reference to that character of damages, as mental satisfaction was the prime consideration sought by the plaintiff and the very nature of the contract imputed notice to the mortician that failure to competently discharge that obligation would produce mental suffering. It was conceded by the court that there was no substantial pecuniary loss suffered by the plaintiff.⁷

The interest in security of person and property has been considered important enough to justify damages for mental suf-

² See *Thrush v. Fullhart*, 230 Fed. 24 (4th Cir. 1915).

³ *Goddard v. Westcott*, 82 Mich. 180, 46 N.W. 242 (1890).

⁴ *Johnson v. Levy*, 118 La. 447, 43 So. 46 (1907). The court held that the damages were compensatory—for mental suffering—and could not be punitive as punitive damages could not be enforced against a decedent's estate according to the civil law.

⁵ *Renihan v. Wright*, 125 Ind. 536, 25 N.E. 822 (1890).

⁶ *Kirksey v. Jernigan*, 25 So. 2d 188 (Fla. 1950), the action was said to be founded in tort and the acts of the defendant were held to imply malice; thus punitive damages and damages for mental suffering were allowed. *But cf.* *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1930), recovery denied where there was no allegation of malice.

⁷ *Lamm v. Shingleton*, 231 N.C. 10, 55 S.E.2d 810 (1949). This case proceeded on pure contract theory; the court repudiated any idea of a tortious breach.

fering when the contract concerns protection of these interests. Thus where there was a failure to adequately repair a roof, causing water damage to the interior of a home, the court examined both the contract and tort aspects of the case and concluded that recovery should be granted on both theories.⁸ The contractual duty was considered to be so coupled with matters of mental concern that the mental anguish was a reasonable result of the breach.

Other Protected Personal Interests

The right to privacy has been looked upon with increasing favor by courts in the United States,⁹ and in order to adequately protect this interest one court has allowed damages for the mental suffering necessarily involved where the breach of contract results in an invasion of the right to privacy. In that case a professional photographer displayed a photograph of one of his customers in his display window contrary to a prior agreement with the customer, and the court allowed damages for mental suffering since the breach was alleged to be malicious and wanton.¹⁰ The court arrived at a just result but it confused the theories of tort and contract by concluding that the breach was malicious.

The liability of innkeepers and those who maintain public resorts is similar to that of common carriers, and the courts have granted a similar right of recovery for mental damages resulting from the breach of personal service contracts. Thus after accommodations were granted at a hotel and a guest was refused service in the dining room, the court allowed a recovery for the resulting embarrassment and humiliation.¹¹ The same remedy has been granted for the expulsion of ticket holders from a public resort¹²

⁸ *F. Becker Asphaltum Roofing Co. v. Murphy*, 224 Ala. 655, 141 So. 630 (1932).

⁹ The first case which recognized the right of privacy in the United States was *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905), for later cases see *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931); *Hinish v. Meier & Frank Co.*, 166 Ore. 482, 113 P.2d 438 (1941); *Meetze v. Associated Press*, 95 S.E.2d 606 (S.C. 1956).

¹⁰ *McCreery v. Miller's Groceries Co.*, 99 Colo. 499, 64 P.2d 803 (1937).

¹¹ *Odom v. East Avenue Corp.*, 178 Misc. 363, 34 N.Y.S.2d 312 (Sup. Ct. 1942), *aff'd mem.*, 264 App. Div. 985, 37 N.Y.S.2d 491 (4th Dep't 1942). *But see*, *Frank v. Justine Caterers, Inc.*, 271 App. Div. 980, 68 N.Y.S.2d 198 (2d Dep't 1947). Defendant caterer served food which poisoned plaintiff's guests but recovery for mental anguish denied.

¹² *Aaron v. Ward*, 203 N.Y. 351, 96 N.E. 736 (1911). *But cf.*, *Buenzle v. Newport Amusement Ass'n*, 29 R. I. 23, 68 Atl. 721 (1908).

and a private club.¹³ The claim of malice or wantonness facilitated recovery in these cases as the action sounded in tort where the right to mental damages is generally accepted.¹⁴ It is to be noted that the allegation of malice or wantonness is an important point in pleading this type of action. Accordingly where a hotel failed to provide accommodations for the plaintiff who had previously made reservations, recovery was not allowed¹⁵ but if the refusal had been willful, the court indicated that a different question would be presented.¹⁶

Further, the dishonoring of a negotiable instrument has been held sufficiently personal in nature to warrant recovery for humiliation and mental suffering where actual damages are found,¹⁷ but in the absence of special damages, the general rule that recovery is disallowed for violations of a contract for the payment of money prevails.¹⁸ It therefore appears imperative to allege actual damages such as injury to one's credit standing, or to allege that special expenses were incurred incident to the contract to pay money, before a recovery is permissible.

A recovery for mental damages is allowed in actions on contracts to procure medical treatment.¹⁹ The courts reason that the prolonging of the physical pain is a basis for actual damages to which mental anguish is then a proper incident. That the physician was detained by reason of rendering medical aid to another is immaterial.²⁰

A final example of recovery for mental anguish alone, without any allegation of other "actual" damage or willful and wanton

¹³ *McClellan v. University Club*, 327 Mass. 68, 97 N.E.2d 174 (1951). The court stated that the amount of damages should be the same whether the case sounded in tort or contract.

¹⁴ *McCreery v. Miller's Groceries Co.*, 99 Colo. 499, 64 P.2d 803 (1937).

¹⁵ *Kellogg v. Commodore Hotel, Inc.*, 187 Misc. 319, 64 N.Y.S.2d 131 (Sup. Ct. 1946).

¹⁶ *Id.* at 138.

¹⁷ *Westesen v. Olathe State Bank*, 78 Colo. 217, 240 Pac. 689 (1925). If there are actual damages it is not necessary that the breach be willful or wanton.

¹⁸ *State Nat'l Bank v. Rogers*, 89 S.W.2d 825 (Tex. 1936); *American Nat'l Bank v. Morey*, 113 Ky. 857, 69 S.W. 759 (1902) (dictum). *But see*, *Smith v. Sanborn State Bank*, 147 Iowa 640, 126 N.W. 779 (1910) (even if actual damages were found there could be no recovery for mental distress).

¹⁹ *Hood v. Moffett*, 109 Miss. 757, 69 So. 664 (1915).

²⁰ *Adams v. Brosius*, 69 Ore. 513, 139 Pac. 729, 731 (1914) (dictum). The court held the patient's husband, the contracting party, could not recover because his injury was too remote, but suggested that the patient might have recovered.

conduct, is a Michigan case²¹ in which the plaintiff, a person of social prominence, planned to sail to Europe. Arrangements were made with an express company to transport her luggage to the pier. The trunk did not reach the pier and the plaintiff sailed without it. Without her wardrobe, plaintiff was compelled to remain in her stateroom and was unable to participate in the social functions aboard ship. The contract was held to be personal and recovery for mental suffering was allowed. The court arrived at a just result as this was the only possible basis for compensation, since the plaintiff had suffered no pecuniary loss. This rationale should be followed in the future in order to protect the interests of those who rely on the services of others when they cannot serve themselves.

The Common Carrier Cases

Another accepted area in which breach of a contractual obligation has imposed liability for mental suffering occasioned thereby is in the field of contracts with common carriers. For example, the breach of a contract to provide a special train to transport an ailing son for treatment was sufficient to warrant damages for the grief suffered by the contracting parent.²² Since the carrier was informed of the nature of the contract, the consequent delay in transportation was termed wanton negligence by the court. This is contrary to an earlier decision in which the anxiety was said not to be within the contemplation of the defendant when the contract was made.²³ It is agreed that a passenger on a scheduled train can insist only on the exercise of due diligence in the operation of the train to prevent unreasonable delay.²⁴ A public transportation utility can be held liable for mental anguish unattended by physical injury only when the utility undertakes to perform its contract; until that time it is free to exculpate itself from its obligation and will incur no liability. Thus where passengers were let off several miles from a station and were forced to walk to their destination during bad weather, recovery for mental suffering was granted.²⁵

²¹ *McConnell v. United States Express Co.*, 179 Mich. 522, 146 N.W. 428 (1914).

²² *Burrus v. Nevada-California-Oregon Ry.*, 38 Nev. 156, 145 Pac. 926 (1915), *appeal dismissed*, 244 U.S. 103 (1917).

²³ *Wilcox v. Richmond & D.R. Co.*, 52 Fed. 264 (4th Cir. 1892).

²⁴ *Central of Georgia Ry. Co. v. Wallace*, 141 Ga. 51, 80 S.E. 282 (1913). The court refused to allow recovery for mental anguish because it was not connected with a physical injury.

²⁵ *Brown and Wife v. Chicago, Milwaukee & St. Paul Ry. Co.*, 54 Wis. 342, 11 N.W. 356 (1882).

But recovery was denied on the issue of proximate cause where the alleged mental pain was suffered by a potential passenger while waiting in the carrier's station.²⁶ This result is unsatisfactory because users of public transportation rely upon time schedules in transacting or planning their affairs, on the assumption that the carriers will transport goods and passengers in strict compliance with their time tables.

The recovery of damages for injuries received by passengers aboard common carriers has been a much litigated question and recovery is frequently allowed for mental suffering. Disrespectful treatment toward passengers by an employee of the common carrier renders the carrier liable for "wounding" a person's feelings as well as for actual damages for assault.²⁷ Once again it can be seen that reliance upon a theory of negligence in discharging a duty to adequately care for and protect passengers will allow the court to fully compensate for breach of a contractual duty without being met with the defense that mental suffering is no part of a breach of contract action.²⁸

The Telegraph Cases

Historically, the first cases in which recovery for mental suffering was allowed in an action for breach of contract involved the failure to deliver telegrams in a timely manner. The foundation case is *So Relle v. Western Union Tel. Co.*²⁹ Where the subject of the message concerns a close personal interest of the sender, some courts are willing to grant compensation. For example where the anguish results from failure to receive a death or sickness message in which the failure to deliver causes mental distress, recovery has been granted,³⁰ provided the

²⁶ *St. Louis, I. M. & S. Ry. Co. v. Buckner*, 89 Ark. 58, 115 S.W. 923 (1909). Plaintiff's fear that she would die of consumption because she caught a cold while standing in the defendant's unheated waiting room was not a proximate result of defendant's negligence.

²⁷ *Bleecker v. Colorado & S. Ry. Co.*, 50 Colo. 140, 114 Pac. 481 (1911). The court granted recovery for mental suffering alone on a breach of contract theory because a conductor used insulting language toward the plaintiff, a paid passenger.

²⁸ *Brown and Wife v. Chicago, Milwaukee & St. Paul Ry. Co.*, 54 Wis. 342, 11 N.W. 356 (1882).

²⁹ 55 Tex. 308 (1881).

³⁰ *Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248 (1909); *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N.W. 1 (1895); *Young v. Western Union Tel. Co.*, 107 N.C. 370, 11 S.E. 1044 (1890); *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574 (1888); *So Relle v. Western Union Tel. Co.*, 55 Tex. 308 (1881).

message indicated urgency.³¹ Likewise error in the transmission of the report of a laboratory test was of sufficient severity to cause compensable mental suffering.³² Mental agony which is merely prolonged but not initially caused by the negligence of the telegraph company may also be compensable as there is no rational ground for a distinction between the two situations.³³ However there can be no recovery against a telegraph company where the message concerns only a commercial transaction as the only contemplated damages are pecuniary.³⁴

The theory upon which recovery has been granted for the mental distress has varied widely. It has been advanced that the duty of telegraph companies is parallel with that of a quasi-public institution so that the duty itself does not arise out of the private contract but rather is imposed by law, and that consequently the form of the action is immaterial.³⁵ Others maintain that the contract merely indicates the relation of the parties and the action actually sounds in tort.³⁶

The claim that the measurement of compensation to be granted might prove difficult to ascertain has been rejected,³⁷ and properly so because the problem of computation of damages pervades every field of law. The argument that the consequences of permitting such claims might result in a flood of new litigation has also been rejected³⁸ because the amount of litigation for the recovery of mental damages alone is relatively scarce in those states which allow such damages. Consequently, it appears that the courts which permit recovery for breach of a telegraph contract have provided sufficient safeguards to prevent the bringing of simulated mental damage claims.

Pleading Willful and Wanton Negligence

Those jurisdictions which follow the strict view that recovery for mental suffering is not permitted when suit is brought for

³¹ *Western Union Tel. Co. v. Glover*, 138 Ky. 500, 128 S.W. 587 (1910).

³² *Western Union Tel. Co. v. Redding*, 100 Fla. 495, 129 So. 743 (1930). This was decided under a statute which permitted recovery against telegraph companies.

³³ See *Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248 (1909).

³⁴ *Robinson v. Western Union Tel. Co.*, 24 Ky. L. Rep. 452, 68 S.W. 656 (1902).

³⁵ *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N.W. 281 (1904).

³⁶ See *Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248, 251 (1909).

³⁷ See *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N.W. 281, 283-84 (1904).

³⁸ *Middleton v. Western Union Tel. Co.*, 183 Ala. 213, 62 So. 744 (1913).

breach of a contract may allow recovery if the complaint alleges an intentional tort. Consequently, if the wrong committed is not alleged to be willful and malicious there can be no recovery. The following cases exemplify this result: delay in the transportation of a body for burial;³⁹ failure to take photographs of the deceased before burial;⁴⁰ the loss of photographic negatives taken of a child pending the child's death;⁴¹ and failure to make insurance payments whereby the surviving spouse was compelled to borrow funds to provide for the burial of her husband.⁴² In all the above instances the agreements were contracts relating to services to be rendered to a member of the complainant's family or to activities that were incident thereto. If the complainants in these cases had charged that the breach of the agreement was willful or intentional,⁴³ or had alleged some form of actual damages,⁴⁴ it is believed that relief for mental anguish would have been allowed. Query, whether the right to relief should depend upon the form of the allegation or rather upon the type of injury suffered?

A recent case⁴⁵ concerned humiliation and mental suffering of an acute nature arising out of unique circumstances. A stunt man contracted with his employer for the re-enactment of the famous Brinks robbery as an advertising scheme, one provision being that the employer was to notify the Omaha police of the hoax. However, the employer breached his contract by failing to give the required notice. Consequently the actor was arrested and was confined for an hour and a half in the city jail. The news of the arrest received national publicity.

In his complaint the actor alleged that he suffered shame, humiliation and severe mental pain. The Nebraska Supreme Court held that the plaintiff could not recover, on the familiar reasoning that a recovery for mental suffering could not be based on the

³⁹ Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 151 (1913); Beaulieu v. Great Northern Ry. Co., 103 Minn. 47, 114 N.W. 353 (1907). *Contra*, Hale v. Bonner, 82 Tex. 33, 17 S.W. 605 (1891).

⁴⁰ Plummer v. Hollis, 213 Ind. 43, 11 N.E.2d 140 (1937).

⁴¹ Thomason v. Hackney & Moale Co., 159 N.C. 299, 74 S.E. 1022 (1912). The plaintiff was the mother of the deceased child, but the child's aunt had made the contract, therefore, the court found that the mother's mental pain was not contemplated by the defendant.

⁴² Clark v. Life & Cas. Ins. Co., 245 Ky. 579, 53 S.W.2d 968 (1932), holding that there can be no recovery for mental damages in actions on contract where such damages are not incident to some physical injury.

⁴³ Hall v. Jackson, 24 Colo. App. 255, 134 Pac. 151 (1913).

⁴⁴ Beaulieu v. Great Northern Ry. Co., 103 Minn. 47, 114 N.W. 353 (1907).

⁴⁵ Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955).

breach of an "ordinary" contract. The court reasoned that the defendant-employer could not have anticipated at the time the contract was executed that the plaintiff would suffer mental pain if the contract were breached. The court also considered the question of causation and determined that the mental suffering was not a natural result of the breach. Finally, the court intimated that the plaintiff might well have gained more than he lost because of the nationwide publicity—something the court thought every actor would be more than happy to receive.

It is suggested that the reasons advanced for the denial of mental damages in this case are absurd. First, when this agreement was executed, it was foreseeable that if the local law enforcement agencies were not notified the participants in the promotion would surely be apprehended if not physically injured as well. Furthermore, it was likewise within the contemplation of the parties that humiliation would naturally result from a confinement, no matter how short its duration, and especially so when the misfortune received nationwide publicity. Second, it was alleged that the actor suffered unemployment for a period of eight months, which should have been sufficient to constitute actual damages, to which mental suffering is an accepted incident of recovery under a tort theory. Finally, while actors seek publicity by sundry means, it is suggested that they do not normally seek publicity through *involuntary* confinement in a jail. Though it is admitted that unusual circumstances of this kind usually result in increased financial gain to the actor by capitivating the public fancy, nevertheless it is submitted that the mental suffering should be determined by reference to the individual's personal sensibilities and not offset by the insatiable interest of the general public in this type of escapade. Although the actor did not plead willful or wanton negligence in his complaint, the recovery should have been granted as there was a breach of contract which could only be described as grossly negligent.

Legislation

Arkansas and Wisconsin have overruled their case decisions denying recovery for mental suffering, by enacting legislation providing for the recovery from telegraph companies for mental damages for the negligent delivery or delay in the transmission of messages.⁴⁶ Three other states have also enacted identical

⁴⁶ ARK. STAT. ANN. § 73-1813 (1947); WIS. STAT. § 182.019 (1955). The latter limits recovery for mental anguish to \$500.00.

legislation.⁴⁷ The state of Louisiana has passed the most comprehensive statute in this particular area. Article 1934 of the Civil Code of Louisiana provides:

Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.⁴⁸

Referring to the examples set forth in this statute, it is apparent that the legislature intended to compensate parties for damages for personal discomfort or for the satisfaction of aesthetic desires. Such was the nature of a contract in an early case⁴⁹ where a dressmaker was negligent in failing to provide dresses for a wedding and the incident festivities. Compensation was allowed for what was reasonably within the parties' contemplation, which included disappointment and humiliation as a result of being without a trousseau. There was no indication that the court encountered any difficulty in determining the bride's disappointment in terms of monetary compensation. Subsequently, the Louisiana court applied a literal interpretation to the words "intellectual enjoyment" and "convenience" by extending the coverage of the statute to a breach of contract to sell a house which was particularly suited to the purchaser's taste. In this situation, the court found the object of the contract to be the gratification of intellectual desire and convenience, and consequently a recovery for disappointment was allowed;⁵⁰ however, a contract to place one's home in a first rate condition⁵¹ and a contract to renovate a bathroom⁵² have been held not to be directed towards intellectual satisfaction and therefore were held not to be within the terms of the statute. It is difficult to justify the distinction between the cases, for if the statutory terms "gratification of intellectual enjoyment" and "some convenience" apply to the purchase of a house, certainly these same factors are present in desiring a present home to be improved to suit the owner's tastes. Apparently the courts in the latter cases found the contracts to be primarily concerned with a pecuniary

⁴⁷ FLA. STAT. ANN. § 363.06 (1943); OKLA. STAT. ANN. tit. 13, § 176 (1937); S. C. CODE ANN § 58-255 (1952).

⁴⁸ LA. CIV. CODE ANN. art. 1934 (3) (West 1952).

⁴⁹ *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903).

⁵⁰ *Melson v. Woodruff*, 23 So.2d 364 (La. 1945).

⁵¹ *Lillis v. Anderson*, 21 So.2d 389 (La. 1945).

⁵² *Baker v. Stamps*, 82 So.2d 858 (La. 1955).

interest, and for this reason, could find no gratification of intellectual enjoyment in their performance.

Conclusion

It is submitted that protection should be afforded for a breach of contract that is personal in nature or concerns the close members of one's family. As stated in the introduction, mental suffering is a proper element in tort, for mental suffering is so intimately connected with the physical injury as to make separation impracticable. The allowance of this item in tort and the ability to reduce the claim to terms of money answers the contention that the plaintiff must be entitled to damages on some other recognized ground before compensation may be awarded for mental suffering. The recovery should be independent of the form of allegation and dependent only on the character of the wrong suffered. As to the further restrictions that mental suffering in the event of a breach must have been within the contemplation of the parties at the time of execution or that it must be a natural and direct result of the breach, it is suggested that the courts have been much too strict in their application of these general principles. It is apparent from common knowledge of human psychology that men are deeply affected by feelings of humiliation, disappointment and frustration. Because all rational men have experienced these feelings it cannot be doubted that they are aware of the possibility of their fellow man suffering similar emotional distress. For this reason, it seems the courts are far behind our present knowledge of psychology when they refuse to allow compensation for mental suffering on the ground that the parties did not contemplate such a result. This is particularly true of contracts concerning personal services⁵³ and close family relations. Finally, the requirement of a willful or wanton breach is misleading and a source of difficulty since it connotes wrongful conduct, the remedy for which partakes of the nature of a penalty, whereas the action brought is solely concerned with compensation. The theory of retribution has no place in these contract actions. One of the characteristics of the common law is its adaptability to changing social conditions. This field has long been awaiting its attention.

John F. Chmiel

⁵³ See *Carmichael v. Bell Tel. Co.*, 157 N.C. 21, 72 S.E. 619, 621 (1911), in which it is recognized that parties may contract with reference to non-pecuniary adjustment in the event of non-performance.